The Silent Transformation of Property

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Contrary to prevalent scepticism, the right to private property transcends the protection of economic exchange and can be relevant to broader societal discourses. In Europe, claims based on the protection of private property have been made in a wide variety of contexts before the ECtHR and the CJEU. They range from the protection of consumers and their family homes from unfair mortgage terms to the subsistence and wellbeing of individual applicants and from banking supervision and shareholding rights to salary and pension cuts following the financial crisis. The core issue that cuts across these examples relates to our understanding of the right to property and the way in which it is shaped in diverse and complex governance structures within, and especially beyond, the state. In this context, the nature of the right remains elusive and riddled with a fundamental tension between its economic and non-economic sides.

This blog post seeks to demonstrate that it is possible to depart from an antithetical and mutually exclusive understanding of the economic and non-economic sides of property as diverse societal discourses shape its transformation. Rather than manifesting irreconcilable elements, the different dimensions of property are mutually constitutive of the right and this is illustrated by the jurisprudence of international courts that contribute to its interpretation. This allows for a possibility of evolution and adjustment of its scope and function. Private property, in turn, can have a transformative impact that takes root not only in the economic but in all aspects of society. The arguments presented here are expanded in my article 'In-between an Economic Freedom and a Human Right: A Hybrid Right to Private Property'.

Considering the role of courts in this context, the CJEU and the ECtHR are good candidates for reflecting on the above issues, as they are the main regional judicial actors in the European legal space. This is especially relevant, given that they have attracted the criticism that they abstract property – and other rights – from its social context and interpret it on the basis of an economic model which focuses on the generation of profit and the objective market value of assets. This criticism has also been extended to the courts' approach in the context of the financial crisis, given the absence of social rights from the ECHR and their relative weakness under EU law.

The jurisprudence of the courts demonstrates, however, that they have been increasingly willing to consider the economic and non-economic dimensions of private property in distinct ways. Illustrative in this regard are cases relating to the nationalisation of Northern Rock (*Grainger*-ECtHR), the haircut of state bonds (*Accorinti*-CJEU) and banking supervision (*Albert*-ECtHR), among others. Both courts have recognised that the economic nature of some forms of property entails significant financial risk which, by itself, may lead to partial or even total loss of the value of property. In this context, they have assumed that such intrinsic risks and hazards are knowingly undertaken by property-holders (i.e., when dealing with economic assets whose value is tied to market conditions, such as shares) and have elevated these aspects to relevant factors when evaluating the proportionality of restrictions on the right to property. The more risky and speculative the nature of the property in question, the more the centre of gravity lies on its economic characteristics. In these circumstances, the review of national measures limiting the right is more lenient, and therefore, economic conduct that may be socially harmful is not shielded behind the protection of the right to property. The policy of moral hazard and the economic aspects of shareholding has played a significant role in the courts' reasoning: had the share/bond-holders been allowed to benefit by receiving compensation, this would have encouraged bad business decisions by managers and shareholders in other banks on the assumption that they were entitled to a safety net with the availability of similar support.

Moreover, the courts have managed to link the economic and social dimensions in their interpretation of the right and to switch between the two. In this sense, they turn to the non-economic logic of property as a way of reading social obligations into the sphere of the economy. This is evident when courts are asked to assess measures that concern social elements of property due to their impact on the subsistence or family home of the affected party (e.g., *N.K.M.* and *Koufaki*-ECtHR and *Aziz*-CJEU. In *Aziz*, the Court framed the dispute with reference to the protection of housing and the family home and brought social considerations relating to property within the scope of consumer law, a key area of the EU's internal market.). By considering factors such as personal hardship and well-being, the courts are able to assess whether individual applicants have been disproportionately affected in comparison to other parts of the population and to 'lighten the burden' of those most severely affected.

The point of my analysis is to move beyond a doctrinal categorisation of the right and to provide a broader examination of the social dynamics that bring about the transformation of property and drive forward its conceptualization, so that it does not remain limited to mutually exclusive configurations. Has, then, social theory -social systems theory in particular- any tools to offer to better understand the case law and analyse the right? Indeed, theory and doctrine seem to converge.

As a classical institution of private law, property enables the participation of economic actors in the market, the acquisition of assets and the generation of profit. Property law, however, has become much more complex and multi-dimensional. It is responsive to the many rationalities of society and provides legal form to social institutions that are shaped by non-economic logics. Indeed, the law translates the economic operations of dealing with property into a set of permissible actions and corresponding limitations in relation to the use of economic assets. At the same time, it receives information from social systems other than the economy (e.g. politics), so that it binds economic operations and restrains economic conduct that is damaging to society. In this sense, it ensures the compatibility of economic forms of activities with social considerations emerging from other non-economic fields and therefore, limits the excessive growth of economic exchange that can have adverse effects.

Under human rights law, the right to property does not lose its connection to economic assets and to the guarantee of economic action. As such, it ensures a sphere of individual freedom protected from arbitrary exercise of state power and can facilitate integration and participation in the market. Nonetheless, social considerations can be observed when restrictions on property are permitted in the public interest or when national measures affecting the right to property are assessed based on their impact on the level of subsistence and hardship of the right-holder. Property can thus enter into the realm of the welfare state and demonstrate affinity with its rationality.

The point here is not only to illustrate the different roles of property in economic and human rights law contexts (see also here), but to demonstrate that the different elements are intrinsically linked. Property is therefore transforming from a unitary institution of private law into, what may be called, a hybrid construct: a hybrid right to property oscillates between its economic and social dimensions with the potential of managing their tensions and rendering them complementary. The hybridity is manifested in the reasoning of the courts and is translated into a legal formulation, which can integrate the different sides of property and can be projected into the debates about the desirability and dialectic of these sides.

In this silent transformation of property lies also its transformative role. The right is presented with the monumental task of dealing with diverse fields of social activities and with different policy

and legal areas, including consumer law, pensions, unemployment benefits as well as monetary policy and structural economic reforms. More recently, the ECtHR even opened up the possibility of relying on positive obligations under Article 1-Protocol 1 in order to defend individual applicants against the effects of climate change (*Duarte Agostinho*). Managing the tensions that the right to property is faced with can contribute to overcoming a one-sided orientation and to fully capturing its role in society and the transformative impact it can have.

While legal guarantees for a hybrid right to property are indispensable in safeguarding the spontaneity, innovation and growth-generating capacities of non-state actors, they also ensure that economic activities do not over-expand or damage the prospects of economic recovery, sustainability and inclusion in different sectors of society. The interpretation of the right in this way overcomes the pure incrementalism of an exclusively economic dimension of property. It acts as a corrective mechanism that combines the strength of internal self-organisation of the economic system with external strategic guidance that develops its responsiveness to the wider society.

Overall, it is possible to conceptualise the protection of property as a measure for reviewing arbitrary political practices (as in *N.K.M.*), but also the compulsion of growth of other social systems that is manifested, for instance, in economic activities that may lead to socially harmful results (as in *Grainger*). Its transformation into a hybrid construct illustrates its inbuilt flexibility and capacity to oscillate between its different functions in rapidly changing societal practices at the transnational level.

Short Biographical Note:

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